United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-2146

To be submitted by
BARRY R. FERTEL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FREDDIE MOORE,

Plaintiff-Appellant

-against-

PETER PREISER, Commissioner New York State Department of Correctional Services;
LEON J. VINCENT, Superintendent Green Haven Correctional Facility;
LIEUTENANT SEITZ, Correctional Officer, Green Haven Correctional Facility,
SULLIVAN, Correction Officer Green Haven Correctional Facility;
DR. P. J. MANNING, Chief Resident Dentist, Green Haven Correctional Facility;
DR. H.L. RHODES, Resident Dentist; GREEN HAVEN CORRECTIONAL FACILITY;
DR. SIEMEN, RESIDENT DENTIST, GREEN HAVEN CORRECTIONAL FACILITY;
DR. FRANKS, Pesident Physician, Green Haven Correctional Facility;

Defendants-Appellees.

ON APPEAL FROM AN ORDER BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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ON APPEAL FROM AN ORDER BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

Statement

This is an appeal by plaintiff-appellant (hereinafter "Plaintiff") from an order of the United States District Court for the Southern District of New York, (Knapp, J.), dated August 4, 1977, granting defendants-appellees' (hereinafter "Defendants") motion for judgment on the pleadings.

The court had previously, in a decision by Judge Knapp dated O[illegible] 14, 1974, granted defendants-appellees' motion to dism[illegible].e complaint as to five of the eight defendants. The dismissal was without prejudice to plaintiff's right to file an amended complaint. The three remaining defendants served their answer to the complaint on December 6, 1974.

Plaintiff thereafter moved for summary judgment, which motion was denied by Judge Knapp in an opinion dated November 1, 1974.

Thereafter, a copy of plaintiff's undated amended complaint, accompanied by a cover letter dated November 28, 1974, was sent to the Attorney General. Defendants served their answer to the amended complaint on December 12, 1974. Defendants motion for judgment on the pleadings was granted on August 4, 1977, and it is from that decision which plaintiff appeals.

Questions Presented

1. Can plaintiff's complaint be sustained insofar as he demands only injunctive relief?

2. Did the District Court properly dismiss plaintiff's amended complaint for failure to allege a deprivation of his constitutional right to adequate dental and medical care?

3. Did the District Court properly dismiss plantiff's amended complaint against defendants Preiser and Vincent for failing to allege that said defendants were personally responsible for plaintiff's alleged injuries?

4. Was plaintiff denied access to the courts by defendant Seitz in violation of plaintiff's constitutional rights?

Facts

Plaintiff alleged in his amended complaint, that he received inadequate dental care during his incarceration at Green Haven Correctional Facility. The complaint consists of a recital of plaintiff's frequent visits to the prison dentist from October 1973 to May 10, 1974, and his version of the treatment received. Plaintiff also complained of being unjustly punished for "being out of place" in the mess hall, which apparently resulted from confusion over his proper diet. In his amended complaint, plaintiff abandoned his original demand for monetary damages seeking instead only declaratory judgment and injunctive relief.

Defendants, Manning, Siemen
Rhodes and Franks

Defendants Manning, Siemen and Rhodes were dentists at Green Haven. Plaintiff alleged that defendant Manning, the Chief Resident Dentist, treated plaintiff on several occasions for various tooth ailments, and prescribed a special Bran Diet for plaintiff (paragraphs 10, 14, 16, 17, 19 and 20).

The amended complaint alleged that Defendant Siemen treated plaintiff inadequately when Dr. Siemen tried to "drill out" one of plaintiff's teeth with a hammer (para. 14), and on a subsequent visit when Siemen removed tooth particles from plaintiff's gums without an anesthetic. Plaintiff alleged that Dr. Rhodes inadequately filled one of plaintiff's teeth, (para. 9) and improperly treated an abcessed canine tooth (para. 10).

Defendant Franks, a resident physician at Green Haven, was alleged to have told a prison guard to forbid plaintiff from eating a special diet prescribed by Dr. Manning (para. 25).

Defendants Sullivan and Seitz

Plaintiff alleged that Sullivan, a prison guard at Green Haven, refused to give plaintiff his special diet (para. 6, 25 and 26). It was further alleged by plaintiff that he was

not given the soft diet prescribed by Dr. Manning during the period that plaintiff was ordered "keep-locked" (para. 25-27).

Lieutenant Seitz, as head of the prison adjustment committee is alleged to have belatedly dismissed disciplinary charges against plaintiff, ordering his release from "keep-locked". (para. 28). It was alleged by plaintiff that defendant Seitz threatened plaintiff, or any prisoner who might assist plaintiff in a court action with "segregation" (para. 30).

Defendant Vincent

In 1974, defendant Vincent was the Superintendent at Green Haven. In his amended complaint, plaintiff alleged that defendant Vincent met with the plaintiff's mother in the prison on July 27, 1974. Plaintiff also alleged that his mother complained to Superintendent Vincent of her son's dental condition and that defendant Vincent told her that he concurred with the medical judgments of defendants Manning, Rhodes and Siemen (paragraph 31).

Defendant Preiser

In 1974, defendant Preiser was the Commissioner of Corrections for the State of New York. Plaintiff alleged, on information and belief, that Commissioner Preiser was aware of

the allegedly unlawful acts of the other defendants (paragraph 33). It was further alleged by plaintiff that it appeared that Commissioner Preiser authorized the "behavior of his staff" when they allegedly intercepted plaintiff's mail (paragraph 33).

For their answer the defendants issued a general denial of each of plaintiff's allegations, and as affirmative defenses that the court lacked subject matter jurisdiction, and that the complaint failed to state a claim upon which relief could be granted.

The District Court of the Southern District of New York (Knapp, J.) held that plaintiff had failed to sufficiently expand upon the allegations in his previously dismissed complaint so as to allege facts against the defendants establishing a deprivation of his constitutional rights. The Court, therefore, ordered that plaintiff's complaint be dismissed in its entirety.

POINT I

INSOFAR AS PLAINTIFF IS NO LONGER ENTITLED TO INJUNCTIVE RELIEF HIS COMPLAINT SHOULD BE DISMISSED IN ITS ENTIRETY.

It is well settled that injunctive relief will not lie where, as here, it is clear that the allegedly wrongful behavior is no longer occuring and will not reasonably be

expected to recur. Tawwab v. Metz, 554 F. 2d 22, (2d Cir. 1977). Plaintiff, having abandoned his original demand for monetary damages, merely sought to prevent the repetition of the alleged incidents of March-May, 1974. Plaintiff, however, is assured of not suffering from such continued inadequate treatment of his diseased teeth as his remaining teeth were removed in May of 1974 (para. 18). The plaintiff's inability to allege that the acts of the defendants were likely to be repeated precludes the issuance of an injunction, Williams v. McMann, 454 F. 2d 1139 (2d Cir. 1972).

Since plaintiff's complaint demands only injunctive relief it should be dismissed in its entirety. Monell v. Department of Social Services of the City of New York, 532 F. 2d 259 (2d Cir. 1976), appeal pending. Furthermore all medical defendants have gone from Green Haven, thus completely mooting the case.

POINT II

PLAINTIFF'S ALLEGATIONS HAVE FAILED TO SHOW "DELIBERATE INDIFFERENCE" BY THE DEFENDANTS TO PLAINTIFF'S MEDICAL AND DENTAL NEEDS, AS REQUIRED BY THE SUPREME COURT IN ESTELLE v. GAMBLE.

The Supreme Court recently held that a prisoner's complaint of inadequate medical care is insufficient to state a claim under § 1983 unless facts are alleged which demonstrate a "deliberate indifference to serious medical needs of prisoners." Estelle v. Gamble, 429 U.S. 97, 194 (1976).

In Estelle, supra, the plaintiff, an inmate at a Texas prison facility, alleged in his complaint that he suffered an injury to his back while unloading a truck. The prisoner was examined by a physician who prescribed medication for the injury. Gamble was then allowed to remain in his cell for a period of three weeks. Thereafter, he was certified by a prison physician as being fit for work, but Gamble, complaining of severe pain, refused to report for work. He appeared before the prison disciplinary committee which directed that he be re-examined by another doctor. Plaintiff still refused to report for work, and the prison disciplinary committee after ruling that he was in good health placed him in solitary confinement for his refusal to work.

Gamble also asserted that a prescription for treating high blood pressure was not filled for four days. Gamble further alleged that on a later occasion, the guards refused to allow him to see a physician for treatment of severe pains in his chest, arm and back.

Even assuming that the prisoner's allegations were true, as it was required to do, Haines v. Kerner, 404 U.S. 519 (1972), the Court held that the complaint failed to state a cognizable claim under 52 U.S.C. § 1983. The Court reversed the Fifth Circuit's reversal of the District's Court's sua sponte dismissal of the complaint, ordering a rehearing by the Fifth Circuit concerning the allegations against the Director of the Department of Corrections and the Warden of the prison. On remand, the Fifth Circuit held that the complaint as against the warden and the Director of the Department of Corrections should also have been dismissed for failure to state a cause of action under 42 U.S.C. § 1983. Gamble v. Estelle, 554 F. 2d 653 (5th Cir. 1977).

Both before and after the Court's decision in Estelle, this Circuit has also held that a prisoner's complaint of inadequate medical care will not be sustained under 42 U.S.C. § 1983 unless facts are alleged suggesting a "deliberate indiferrence" by prison officials towards the serious medical needs of the prisoner. Todaro v. Ward, 565 F. 2d 48, 51 (2d cir. 1977); Cruz v. Ward, 558 F. 2d 658, 661 (2d Cir., 1977); Williams v. Vincent, 508 F. 2d 541, 544 (2d Cir. 1974); Bishop v. Stoneman, 508 F. 2d 1224, 1225 (2d Cir. 1974); Corby v. Conboy, 457 F. 2d 251, 254 (2d Cir. 1972).

Generally, plaintiff complains of the adequacy of his medical care. He alleges that he was mistreated by several dentists at Green Haven, and that such mistreatment was a violation of his constitutional rights. He also asserted that a prison guard was responsible for the alleged failure to provide him with a prescribed soft diet during the period that he was keep-locked. It was further charged by Moore that another prison officer violated plaintiff's constitutional rights in dismissing disciplinary charges brough against him. Finally, appellant alleged that the Superintendent Warden and the Commissioner of Corrections were responsible for the alleged acts of the subordinates.

It is readily apparent that the acts of which Moore complains are similar to those of which Gamble complained, Gamble, however, alleged a greater seventy of mistreatment than this plaintiff. See 429 U.S. at 99-101. Gamble alleged severe back pains, as well as a four day period when he did not receive his prescribed medication. More importantly, it was claimed that the prison disciplinary committee without a hearing found Gamble to be in good health and ordered him to be placed in solitary confinement. 429 U.S. at 101. On the other hand, Moore alleges that the adjustment committee at Green Haven, headed by defendant Seitz, dismissed all charges against him (para. 29).

Gamble also alleged that after several complaints by him about his severe pain, the prison guards still refused to allow him to see a prison physician. Here, Moore has only alleged that on three occasions he was not given a soft diet, (para. 27) which may have been a result of mere inadvertence on the part of the prison guards. There was no allegation by Moore that he suffered from anywhere near the same degree of pain as was alleged by Gamble. In sum, Gamble's insufficient complaint alleged far worse treatment than was alleged by Moore against the eight defendants in this case, a fortiori,

plaintiff's complaint did not state a cognizable claim under § 1983.

Defendants Manning, Siemen, Rhodes and Franks

In his amended complaint, plaintiff alleged that he was treated by defendants Manning, Siemen and Rhodes for various dental problems. There was no allegation that on any one occasion the defendants refused to treat plaintiff. Plaintiff may have disagreed with his dentists over the choice of proper treatment, but that would not constitute sufficient grounds for a claim cognizable under § 1983. Estelle v. Gamble, supra; Williams v. Vincent, supra 508 F. 2d at 544; Corby v. Conboy, supra, 457 F. 2d at 254; United States ex rel. Hyde v. McGinnis, 429 F. 2d 864, 866 (2d Cir. 1970); Sloan v. Zelker, 362 F. Supp. 88 (S.D.N.Y. 1973). See also Prisoners' Right to Medicare Care, 28 A.L.R. Fed. 279 (1976), § 8.

Clearly, the allegations against the prison dentists assert nothing more than defendants' continuous treatment of plaintiff's dental problems. Nevertheless, even if one could infer that defendants negligently treated plaintiff, such allegations of malpractice are not of constitutional dimension. Estelle v. Gamble, supra, 429 U.S. at 106; United States ex rel.

Hyde v. McGinnis, supra, 449 F. 2d at 866; Church v. Hegstrom, 416 F. 2d 449 (2d Cir. 1972).

As the Supreme Court stated, "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." 429 U.S. at 106. In sum, the District Court properly held that there can be no possible interpretation of plaintiff's contention which suggests that the defendants displayed deliberate callousness to the dental needs of plaintiff so that a § 1983 action could lie." Opinion of District Court supra at p. 4-5.*

It was also alleged by plaintiff-appellant in his amended complaint that Franks told Officer Sullivan to forbid plaintiff to eat on the diet. In effect, plaintiff alleged that Franks did not believe in the necessity of giving Moore the soft diet, informing Sullivan of this belief. Although such an isolated remark attributed by Dr. Franks, may, in a most charitable reading be viewed as negligence; it cannot be construed as deliberate indifference to the serious medical needs of plaintiff-appellant, as required by Estelle v. Gamble, supra. Opinion of the District Court dated October 15, 1974 at p. 6, Todaro v. Ward, supra. Accordingly, the District

* In a later decision, the District Court, reaffirmed its dismissal against the doctors on the same grounds, granting defendants-appellees' motion for judgment on the pleadings. Opinion dated August 4, 1977 at p.2.

Court properly dismissed the complaint against defendant Franks.

Defendant Sullivan

The District Court originally sustained the complaint against Officer Sullivan as borderline with respect to those allegation which suggested a complete disregard for plaintiff's medical needs. Decision of District Court, October 15, 1974 at 10. In the amended complaint it was alleged that Sullivan had the plaintiff keep-locked for being out of place in the mess hall. It was also alleged that plaintiff was deprived of his special diet on three separate occasions, but there is no allegation that it was officer Sullivan who was personally responsible for the plaintiff's failure to receive his diet. In any event, the District Court properly held that Sullivan should not be faulted for having acted on the instructions of his superior. Just as mere negligence by a prison doctor will not suffice to state a claim under § 1983,

> "an isolated omission to act by a state prison guard does not support a claim under section 1983 absent circumstances indicated an evil intent, or recklessness, or at least deliberate indifference to the consequences of his conduct for those under his control and dependent upon him." (Emphasis added). Williams v. Vincent, supra, 508 F. 2d at 546.

It is clear from a reading of plaintiff's amended complaint that any refusal by Sullivan to give Moore his special diet was prompted by the instructions of a superior. Therefore, it cannot be inferred that Sullivan's conduct was in anyway intended to harm the plaintiff.

In any event, the allegations against Sullivan are far less serious than those levelled against a defendant prison guard in Estelle, supra. There, the prisoner alleged that on two occasions a prison guard refused to allow him to see a physician after he complained of severe pain. Clearly, plaintiff's allegations against Sullivan do not approach the urgency claimed by Gamble. Insofar as the allegations against Sullivan do not reach the level alleged in Gamble, the claims against him are not of constitutional dimension.

The District Court therefore properly held that "the failure to provide a special diet on more than three occasions" could hardly be construed as a deprivation of constitutional rights. Opinion of District Court dated August 4, 1977 at p. 5. See also, Rosenberg v. Martin, 478 F. 2d 520 (2d Cir. 1973); Johnson v. Glick, 481 F. 2d 1028 (2d Cir), cert denied 414 U.S. 1033 (1973); Powell v. Jarvis, 460 F. 2d 551 (2d Cir. 1972).

Accordingly, the District Court properly dismissed the complaint against Sullivan.

Defendant Seitz

In his amended complaint plaintiff alleged that Seitz's dismissal of the charges against him violated his constitutional rights. The District Court properly held that such a dismissal, which inured to the plaintiff's benefit, could not be construed as a violation of his constitutional rights. Opinion of District Court dated November 1, 1974 at p. 8-9.

Moreover, in Estelle v. Gamble, the prisoner there alleged that he was unjustly punished by the prison disciplinary Committee for complaining of severe pain. The Supreme Court held that even if such an allegation were true it would not pass muster under Section 1983. Here, just the opposite occurred. Defendant Seitz dismissed the charges levelled against Moore after he complained of the refusal to give him his soft diet. If the claim in Estelle v. Gamble could not be upheld, it is clear that the beneficial dismissal of the charges by Seitz does not rise to the level of any actionable claim, let alone one cognizable under § 1983.

The District Court therefore properly dismissed this claim against defendant Seitz.

POINT III

PLAINTIFF'S AMENDED COMPLAINT AGAINST SUPERINTENDENT VINCENT AND COMMISSIONER PREISER FAILED TO ALLEGE FACTS SUFFICIENT TO DEMONSTRATE PERSONAL RESPONSIBILITY FOR THE ALLEGED ACTS OF THEIR SUBORDINATES.

Defendant Vincent

The amended complaint alleges that Superintendent Vincent told plaintiff's mother that he concurred with the reports of his medical staff concerning her son's treatment. This endorsement of the activities of his staff does not constitute a deprivation of plaintiff's constitutional rights.

> "A prison superintendent, absent special circumstances, is or should be entitled to rely on the findings and recommendations of his medical experts." Mitchell v. Hendricks, 431 F. Supp. 1295, 1302 (E.D. Pa. 1977).

The allegations against Vincent are in marked similarity to the allegations against the warden in Estelle v. Gamble. As in that context, the allegations against Vincent should also be dismissed. Gamble v. Estelle, supra, 554 F. 2d at 654.

Defendant Preiser

In the amended complaint it was alleged solely that Preiser was aware of the acts of the other defendants. The complaint fails to substantiate this charge, and appears to be holding Preiser liable on a theory of respondeat superior. It is a well settled rule in this Circuit that prison officials cannot be held to be liable in a § 1983 action based upon such a theory. McKinnon v. Patterson, ____ F. 2d _____, Docket Nos. 76-2153, 76-2168 (2d Cir. Sept. 15, 1977); Johnson v. Glick, supra. The complaint must allege specific facts sufficient to show personal responsibility for the acts complained of. Johnson v. Glick, supra; Gamble v. Estelle, supra.

Accordingly, the District Court properly dismissed the complaint against Defendant Preiser.

POINT IV

PLAINTIFF-APPELLANT'S CLAIM THAT HE WAS DENIED ACCESS TO THE COURTS BY DEFENDANT SEITZ IS WHOLLY WITHOUT MERIT.

In his amended complaint plaintiff alleged that defendant Seitz threatened to punish him for taking legal action and to punish any prisoners who filed affidavits on

plaintiff's behalf (Amended Complaint, paragraph 30). It is clear, however, that these alleged threats in no way hampered plaintiff's access to the courts. Indeed, an affidavit by a fellow prisoner, Charles McCullen, was submitted in support of plaintiff's unsuccessful motion for summary judgment. Furthermore plaintiff's presence before this Court fully demonstrates the facility with which he has been able to protect his rights throughout the proceedings in this lawsuit. Accordingly, the District Court properly dismissed the complaint against defendant Seitz.

Insofar as plaintiff-appellant's amended complaint has failed to allege "deliberate indifference" by the defendants to any "serious medical needs" or plaintiff-appellant, as required by the Supreme Court in Estelle v. Gamble, the District Court properly granted defendants-appellants' motion for judgment on the pleadings, dismissing the complaint in its entirety.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
March 23, 1978

Respectfully submitted,

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